Nos. 01-653 and 01-657

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL.

ARCTIC SLOPE REGIONAL CORPORATION, ET AL., PETITIONERS

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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QUESTION PRESENTED

Whether Section 525 of the Bankruptcy Code, 11 U.S.C. 525, displaces the Federal Communications Commission's rules for congressionally authorized spectrum auctions under 47 U.S.C. 309(j), which provide that wireless telecommunications licenses obtained at auction cancel upon the winning bidder's failure to make timely payments to fulfill its winning bid.

PARTIES TO THE PROCEEDINGS

Petitioners and Appellants in the court below were NextWave Personal Communications Inc. and NextWave Power Partners Inc. Respondents and Appellees were the Federal Communications Commission and the United States of America. The following entities were intervenors:

BellSouth Corporation
BellSouth Cellular Corporation
Cellco Partnership d/b/a Verizon Wireless
VoiceStream Wireless Corporation
AT&T Wireless Services, Inc.
Cellular Telecommunications Industry Association
Dobson Communications Corporation
Sprint Spectrum L.P. d/b/a Sprint PCS
TeleCorp PCS, Inc.
Nextel Communications, Inc.
Arctic Slope Regional Corporation
Council Tree Communications, LLC

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-51a)[1] is reported at 254 F.3d 130. The Federal Communications Commission's Public Notice announcing re-auction of the radio spectrum previously licensed to respondents (Pet. App. 96a-97a) is reported at 15 FCC Rcd 693, and its order denying respondents' petition for reconsideration (Pet. App. 52a-95a) is reported at 15 FCC Rcd 17,500.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2001. On September 13, 2001, the Chief Justice extended the time within which to file the petitions for a writ of certiorari to and including October 19, 2001. The petitions were filed on that date. They were granted on March 4, 2002, and the cases were consolidated. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).[2]

STATUTORY PROVISIONS INVOLVED

Section 309(j) of the Communications Act, 47 U.S.C. 309(j) (1994 & Supp. V 1999), and Section 525 of the Bankruptcy Code, 11 U.S.C. 525, are reprinted in the appendix to the petition for a writ of certiorari in No. 01-653. Pet. App. 427a-428a, 431a-469a. Pertinent statutory provisions are also reprinted for convenience in an appendix to this brief.

STATEMENT

1. The Communications Act (the Act) is designed "to maintain the control of the United States over all the chan-

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed by the Federal Communications Commission in No. 01-653.

[2] A petition for a writ of certiorari was also filed by Cellco Partnership, d/b/a Verizon Wireless. See No. 01-654. On February 15, 2002, that petition was dismissed pursuant to this Court's Rule 46.2.

nels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority." 47 U.S.C. 301. The Act establishes the Federal Communications Commission (FCC or Commission) and vests it with the authority to issue radio licenses upon its determination that doing so will serve the "public interest, convenience, and necessity." 47 U.S.C. 309(a). Because of that delegation of authority, "it is the Commission, not the courts, which must be satisfied that the public interest will be served" by authorizing an applicant to use scarce radio spectrum. *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946). Consequently, "no court can grant an applicant an authorization which the Commission has refused," *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 14 (1942), and no license may "be construed to create any right, beyond the terms, conditions, and periods of the license," 47 U.S.C. 301.

For many years, the FCC attempted to identify the license applicant that would best serve the public interest through comparative hearings examining the qualifications of competing applicants. Concerned about that process's "substantial delays and burdensome costs," H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 897 (1981), Congress amended the Act in 1982 to authorize the FCC to award initial licenses to qualified applicants "through the use of a system of random selection," or lottery. See 47 U.S.C. 309(i); Communications Amendments Act of 1982, Pub. L. No. 97-259, § 115, 96 Stat. 1094. The lottery system also proved unsatisfactory. Among other things, it was criticized for "encouraging unproductive speculation for spectrum licenses" and failing "to reward persons who have spent money to research and develop a new technology or service." H.R. Rep. No. 111, 103d Cong., 1st Sess. 248 (1993). See also H.R. Rep. No. 19, 103d Cong., 1st Sess. 16 (1993) (lottery process "arbitrary" and produces "vast financial windfalls for speculators").

Accordingly, in 1993 Congress authorized the FCC to award initial licenses for spectrum dedicated to certain commercial services "through a system of competitive bidding," or auction. 47 U.S.C. 309(j)(1) (1994 & Supp. V 1999); Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 388. Congress recognized that such a market-based system would eliminate speculation, because those who lack an efficient and immediate plan for using the spectrum generally cannot afford to submit the highest auction bid. See H.R. Rep. No. 111, *supra*, at 249. Through the auction mechanism, Congress sought to enable the FCC to further "the development and rapid deployment of new technologies, products, and services" to benefit the public, 47 U.S.C. 309(j)(3)(A), assist in the "recovery for the public of a portion of the value of the public spectrum," 47 U.S.C. 309(j)(3)(C), and promote "efficient and intensive use of the electromagnetic spectrum," 47 U.S.C. 309(j)(3)(D). Congress also intended auctions to promote license allocation "without administrative or judicial delays." 47 U.S.C. 309(j)(3)(A). In 1997, Congress mandated the use of auctions for most initial licensing proceedings. Pub. L. No. 105-33, § 3002, 111 Stat. 258.

At the same time, Congress remained "concerned that, unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries." H.R. Rep. No. 111, *supra*, at 254. Congress therefore directed the Commission to promote "economic opportunity and competition * * * by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses." 47 U.S.C. 309(j)(3)(B). Congress expressed particular concern that auctions might favor deep-pocketed "incumbents, with established revenue streams, over new companies or start-ups." H.R. Rep. No. 111, *supra*, at 255. To enable small businesses to compete, Congress gave the agency, among other tools, "flexibility to design alternative payment schedules." *Ibid.* The statute accordingly instructs the Commission, in issuing regulations, to "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments." 47 U.S.C. 309(j)(4)(A).

Congress made clear that nothing in Section 309(j), or in the use of auctions, was to "diminish the authority of the Commission under the other provisions of [the Communications Act] to regulate or reclaim spectrum licenses," 47 U.S.C. 309(j)(6)(C), or "be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection," 47 U.S.C. 309(j)(6)(D).

2. After lengthy proceedings addressing implementation, the FCC decided to award licenses using simultaneous, multiple-round auctions. *In re Implementation of Section 309(j) of the Communications Act*, 9 FCC Rcd 2348, ¶ 68 (1994). The FCC concluded that an auction design "that award[s] licenses to those parties that value them most highly" would best fulfill the statute's goals. *Id.* at ¶ 69. The agency explained: "Since a bidder's abilities to introduce valuable new services and to deploy them quickly, intensively, and efficiently increase the value of a license to a bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services in each area and the efficient and intensive use of the spectrum." *Id.* at ¶ 71 (footnote omitted).

The FCC also sought to implement the statute's direction to consider installment payments and similar devices to enable small businesses and "designated entities" to participate in the industry. See 9 FCC Rcd 2348, ¶ 229. The spectrum dedicated to broadband Personal Communications Services (PCS) was divided into six auction blocks, identified by the letters "A" through "F." See *In re Implementation of Section 309(j) of the Communications Act*, 9 FCC Rcd 5532, ¶ 6

(1994).[3] Participation in the "C" and "F" Block auctions was limited to small businesses and other designated entities. 47 C.F.R. 24.709(a)(1) (1997). In accordance with 47 U.S.C. 309(j)(4)(A), the Commission allowed small businesses that obtained licenses at auction to pay in installments over the term of the license. 9 FCC Rcd 2348, ¶¶ 231-240. The FCC determined that "installment payments [would] be an effective way to efficiently promote the participation of small businesses * * * and an effective tool for efficiently distributing licenses and services among geographic areas." *Id.* at ¶ 233.[4]

The Commission understood the necessity of "strong incentives for potential bidders to make certain of their qualifications and financial capabilities before the auction so as to avoid delays in the deployment of new services to the public that would result from litigation, disqualification, and re-auction." 9 FCC Rcd 2348, ¶ 197. See also *Mountain Solutions, Ltd.* v. *FCC,* 197 F.3d 512, 519 (D.C. Cir. 1999). The FCC's auction rules accordingly specified that license awards "will be conditioned upon full and timely payment of the winning bid amount." 47 C.F.R. 24.708(a) (1997). For bidders electing to pay in installments, the rules provided that any "license granted * * * shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan," 47 C.F.R.

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[3] Broadband PCS permits a "new generation of communications devices that will include small, lightweight, multi-function portable phones, portable facsimile and other imaging devices, new types of multi-channel cordless phones, and advanced paging devices with two-way data capabilities." 9 FCC Rcd 5532, ¶ 3.

[4] Applicants eligible for the C-Block auction were required to pay ten percent of their winning bid in cash by the time of the license grant, 47 C.F.R. 24.711(a)(2) (1997), with the remainder to be paid over the ten-year term of the license. 47 C.F.R. 24.711(b) (1997). For a qualifying "small business," the interest rate equaled that for ten-year Treasury obligations, with interest-only payments for the first six years. 47 C.F.R. 24.711(b)(3) (1997). Favorable terms were also available to small business bidders for F-Block licenses. See 47 C.F.R. 24.716 (1997).

1.2110(e)(4) (1997), and that, in the event of failure to make timely payments, "the license will automatically cancel," 47 C.F.R. 1.2110(e)(4)(iii) (1997).

3. Respondent NextWave Personal Communications Inc. (NPCI) was formed to participate in the FCC's auction for "C-Block" PCS licenses in the summer of 1995. NPCI was declared the high bidder for 63 C-Block licenses the following year after it submitted winning bids totaling $4.74 billion. Pet. App. 4a-5a. Respondent NextWave Power Partners Inc. (NPPI) was formed to participate in the FCC's F-Block license auction, which concluded in January of 1997. NPPI was declared the high bidder for 27 F-Block licenses after it submitted winning bids of approximately $123 million. See *id.* at 313a-314a; *Public Notice, D, E, and F Block Auction Closes*, DA 97-81, 1997 WL 20711 (Jan. 15, 1997).

In accordance with FCC regulations, respondents deposited sufficient funds to cover their downpayment obligations. Pet. App. 5a. After considering challenges to NPCI's eligibility, the FCC granted the licenses, conditioned on NPCI's compliance with an ownership restructuring plan to bring it into compliance with the FCC's foreign ownership rules and on compliance with all other regulatory conditions. See *In re Applications of NextWave Personal Communications, Inc. for Various C-Block Broadband PCS Licenses*, 12 FCC Rcd 2030, ¶¶ 8-9 (1997). Respondents then executed promissory notes for the balance of their bids, which were to be paid in installments. Pet. App. 313a.

Each license stated that it was "conditioned upon the full and timely payment of all monies due," and that failure to comply with that obligation "will result in the automatic cancellation" of the license. Pet. App. 388a. Separately, the Installment Plan Note executed by respondents acknowledged that the licenses were "conditioned upon full and timely payment" of respondents' obligations to the FCC. *Id.* at 393a. And the associated Security Agreements contained similar acknowledgments. *Id.* at 413a. The Security Agreements further noted that any rights created by those agreements were in addition to, not in contravention of, the FCC's regulatory powers. *Id.* at 403a-404a.

Shortly after the licenses were awarded, a number of C-Block and F-Block licensees, including respondents' parent company, petitioned the FCC to restructure their installment payment obligations, describing "a range of apparent difficulties in accessing the capital markets" because of the prices they had bid. *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for PCS Licensees*, 12 FCC Rcd 16,436, ¶ 11 (1997).[5] In response, the FCC temporarily suspended payment obligations for C-Block and F-Block licensees, and then adopted several options designed to aid C-Block licensees. See *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for PCS Licensees*, 13 FCC Rcd 8345, ¶¶ 11-15 (1998); *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for PCS Licensees*, 14 FCC Rcd 6571 (1999). The Commission refused, however, "to adopt proposals that result in a dramatic forgiveness of the debt owed," because to do so "would be very unfair to other bidders, and would gravely undermine the credibility and integrity of [the auction] rules." 12 FCC Rcd 16,436, ¶ 19. Accordingly, none of the restructuring options adopted by the FCC allowed C-Block licensees to keep any license for less than the full bid amount. Pet. App. 6a; see 13 FCC Rcd 8345, ¶ 8. See *U.S. Airwaves, Inc.* v. *FCC*, 232 F.3d 227, 235 (D.C. Cir. 2000) (the Commission "did not simply forgive agreed-upon payments, much less grant the winning bidders' more sweeping requests for relief").

The Commission gave C-Block licensees until June 8, 1998, to elect a restructuring option, provided that payments

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[5] Respondents have implied that their difficulties resulted from the Commission's unexpected auction of additional licenses. See Br. in Opp. 2. That is incorrect. The Commission had planned and publicly announced additional auctions by August 1995, well before respondents submitted their winning bids. See Pet. App. 308a.

would resume by July 31, 1998, and set October 29, 1998, as the last date on which it would accept late installment payments (with a late fee). FCC Public Notice, *Wireless Telecommunications Bureau Announces June 8, 1998 Election Date for Broadband PCS C Block Licensees*, 13 FCC Rcd 7413 (1998). Respondents and others unsuccessfully sought to stay the election deadline. See *In re Petition of NextWave Telecom, Inc., for a Stay of the June 8, 1998 PCS C-Block Election Date*, 13 FCC Rcd 11,880 (1998); *NextWave Telecom Inc.* v. *FCC*, No. 98-1255, 1998 WL 389116 (D.C. Cir. June 11, 1998). Respondents did not make an election by the June 8, 1998 deadline (and were therefore deemed to have elected to resume full payment); they did not begin making the payments that were an express condition of their licenses; and they made no effort to obtain any agreement or assurance from the Commission as to the effect of their bankruptcy filing. Pet. App. 57a-58a. Instead, on June 8, 1998, respondents filed for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. Meanwhile, the vast majority of other C-Block licensees made their elections by the deadline and either made payments or lost their licenses through operation of the automatic cancellation rule.

4. After filing for reorganization, respondent NPCI filed an adversary proceeding in bankruptcy court, seeking to avoid most of its payment obligation for the C-Block licenses as a constructively fraudulent conveyance under 11 U.S.C. 544. In general, a conveyance is deemed constructively fraudulent if the exchange between the debtor and other party was for less than reasonably equivalent value. Ruling in respondents' favor, the bankruptcy court held that, at the time NPCI submitted its promissory notes to the FCC, the licenses were worth less than NPCI had bid, and that roughly \$3.72 billion of NPCI's \$4.74 billion payment obligation should therefore be avoided as constructively fraudulent. The bankruptcy court ordered that NPCI be permitted to keep its licenses while meeting only just over \$1 billion of

its $4.74 billion payment obligation. Pet. App. 357a-358a. The district court affirmed. *Id.* at 254a-272a.

The Second Circuit reversed and remanded for further proceedings, "if any are necessary." Pet. App. 253a. Although the bankruptcy court had rested its decision to alter license conditions on the theory that they concerned "solely the debtor-creditor relationship between the FCC and [NextWave]," the Second Circuit rejected that approach as "fundamentally mistaken." *Id.* at 234a-235a. Instead, the Second Circuit viewed the payment condition of respondents' licenses as quintessentially regulatory. "The FCC had not sold NextWave something that the FCC had owned," the court of appeals explained. *Id.* at 234a. Instead, the FCC "had used the willingness and ability of NextWave to pay more than its competitors as the basis on which it decided to grant the [l]icenses to NextWave." *Ibid.* Thus, "NextWave's inability to follow through on its financial undertakings had more than financial implications." *Ibid.* Rather, "[i]t indicated that under the predictive mechanism created by Congress to guide the FCC, NextWave was not the applicant most likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted." *Ibid.* "By holding that for a price of $1.023 billion NextWave would retain licenses for which it had bid $4.74 billion," the court of appeals concluded, the "bankruptcy and district courts impaired the FCC's method for selecting licensees by effectively awarding the [l]icenses to an entity that the FCC determined was not entitled to them." *Id.* at 235a. This Court denied respondents' petition for a writ of certiorari. 531 U.S. 924 (2000).

Respondents then modified their proposed reorganization plan to provide that they would pay their overdue obligation in full and pay future installments as they became due. Pet. App. 146a. In a letter to the FCC, respondents offered to pay the discounted present value of their obligations in a lump sum. *Id.* at 147a. The FCC did not accept the offer because, under FCC regulations, respondents' payment default had caused the licenses to cancel by operation of law on October 29, 1998. *Id.* at 61a, 96a. The FCC issued a Public Notice scheduling the spectrum previously licensed to respondents for re-auction. *Id.* at 96a-97a.

On respondents' motion, the bankruptcy court declared the FCC's notice and scheduling of the spectrum for re-auction to be "null, void, and without force or effect." See Pet. App. 113a. The FCC's decision to re-auction the spectrum, the bankruptcy court held, violated the Bankruptcy Code's automatic stay, *id.* at 155a-160a, impaired respondents' right to cure their default, *id.* at 160a-163a, and potentially contravened the Code's prohibition against license revocations premised upon the nonpayment of a dischargeable debt, *id.* at 163a-168a (citing 11 U.S.C. 525). In addition, the bankruptcy court held that automatic cancellation was barred by doctrines of equitable estoppel and waiver applicable to the "government * * * act[ing] in a commercial capacity." *Id.* at 181a-191a. The bankruptcy court acknowledged that the Second Circuit had held "that there is a 'regulatory' aspect in the FCC's 'payment in full' requirement." *Id.* at 191a. But the court found "no such aspect * * * with respect to the FCC's 'timely payment' requirement," which it viewed as a matter of "pure debtor-creditor economics." *Ibid.* See also *id.* at 165a-166a.

The Second Circuit granted a writ of mandamus, directing the bankruptcy court to vacate its order and deny the relief sought by respondents. Pet. App. 102a-133a. The court of appeals observed that its earlier opinion had "held that the FCC's decision as to 'which entities are entitled to spectrum licenses under rules and conditions it has promulgated' is a paradigmatic instance of the FCC's exclusive regulatory power over licensing," *id.* at 116a, and thus beyond the bankruptcy court's authority to revise, *id.* at 108a-109a. The court of appeals rejected the bankruptcy court's conclusion that the timely payment condition in the FCC licenses and regulations was economic rather than regulatory. *Id.* at 118a. "[T]he regulatory purpose for requiring payment in full—the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum—is quite obviously served in the same way by requiring payment on time." *Id.* at 119a. The court of appeals also rejected the bankruptcy court's reliance on the Code's automatic stay provision, 11 U.S.C. 362(a). The court emphasized that the automatic stay is expressly inapplicable to actions to enforce a governmental unit's "police and regulatory power." Pet. App. 125a. In declaring the licenses canceled for failure to meet a license condition and scheduling them for re-auction, the court of appeals held, the FCC was "[u]ndoubtedly * * * a governmental unit * * * seeking 'to enforce' its 'regulatory power.'" *Ibid.* (citing 11 U.S.C. 362(b)(4)). The court of appeals concluded that "[t]he bankruptcy court lacked jurisdiction to declare the Public Notice null and void on any ground." *Id.* at 127a. This Court again denied certiorari. 531 U.S. 1029 (2000).

5. Respondents filed a petition with the FCC, urging it to reconsider its decision that the spectrum would be re-auctioned. Pet. App. 63a. The FCC denied the petition, finding that the license cancellation was "fully consistent" with the statute and regulations, and that the full and timely payment requirement was "paramount" in preserving "the reliability and integrity" of the auction program. *Id.* at 65a-66a. The FCC ruled that respondents' contention that the Bankruptcy Code precluded cancellation had been rejected by the Second Circuit's mandamus opinion and was therefore barred by res judicata. *Id.* at 83a. The FCC also ruled that neither estoppel nor waiver prohibited it from enforcing its cancellation rule. *Id.* at 83a-88a. Respondents sought review of the FCC's decision in the Court of Appeals for the District of Columbia Circuit.

While respondents' challenge to the Commission's action was pending before the D.C. Circuit, the Commission completed its re-auction of the spectrum at issue, along with other C- and F-Block spectrum. In the re-auction, the spectrum covered by the licenses formerly held by respondents produced bids of $15.85 billion, well over three times the $4.74 billion respondents had originally bid, and almost 15 times the just over $1 billion value respondents and the bankruptcy court had assigned to it in bankruptcy proceedings. See Pet. App. 302a, 357a-358a; pp. 8-9, *supra*.[6]

On June 22, 2001, the D.C. Circuit reversed the FCC's license cancellation decision and remanded the case to the agency. The court rejected the FCC's contention that respondents' Bankruptcy Code arguments had been resolved against them by the Second Circuit. Pet. App. 22a-36a. In the court's view, the Second Circuit merely held "that the Commission's license cancellation was a regulatory act reviewable only by a court of appeals under section 402 of the Communications Act, and thus that the bankruptcy court lacked *jurisdiction* to apply the Code to these acts." *Id.* at 24a (emphasis added). However, the court agreed that the Second Circuit's decision barred NextWave from contesting that the FCC's actions fell within the regulatory power exception to the automatic stay, 11 U.S.C. 362(b)(4), in light of the Second Circuit's unequivocal ruling on that issue. Pet. App. 34a, 125a-127a.

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[6] The successful bidders in the re-auction paid more than $3 billion to the FCC as deposits pending issuance of the licenses. In response to a joint request for a refund, the FCC recently agreed to return 85% of their downpayments temporarily. *In re Requests for Refunds of Down Payments Made in Auction No. 35*, FCC No. 02-99, 2002 WL 464682 (released Mar. 27, 2002). The FCC explained that its refund would "give the bidders access to the bulk of their money" during this litigation while "at the same time preserv[ing] the integrity of the auction" by allowing the Commission to "retain sufficient money to cover any future default payments." *Id.* at ¶ 13. The Commission made clear, however, that if it prevailed in these proceedings, the "winning bidders" in the re-auction "will be required to pay the full amount of their winning bids or be subjected to default payments under [its] rules." *Ibid.* On April 8, 2002, Verizon Wireless filed suit challenging the Commission's refusal to refund the full amount of its downpayment and release it from its obligations. *Cellco Partnership d/b/a Verizon Wireless* v. *FCC*, Nos. 02-1110, 02-1111 (D.C. Cir. filed Apr. 8, 2002); see also *Cellco Partnership d/b/a Verizon Wireless* v. *United States*, No. 2-280C (Ct. Fed. Cl. filed Apr. 4, 2002) (seeking damages).

On the merits, the D.C. Circuit held that Section 525 of the Bankruptcy Code, 11 U.S.C. 525, precluded cancellation of respondents' licenses. Section 525 provides that a governmental unit may not revoke a license "solely because" a debtor "has not paid a debt that is dischargeable in the case under this title." 11 U.S.C. 525(a). The D.C. Circuit rejected the FCC's contention that "NextWave's license fee obligation was not a 'dischargeable' debt * * * because the Second Circuit * * * held * * * that so long as NextWave retained its licenses, its payment obligation was subject to neither modification nor discharge in bankruptcy." Pet. App. 41a. The D.C. Circuit read the Second Circuit's decisions as having "merely decided that insofar as timely payment was a condition for license retention, the bankruptcy court had no authority to modify it." *Id.* at 42a. In the D.C. Circuit's view, the Second Circuit "never decided that a court of competent jurisdiction (such as this one) could not modify or discharge [the timely payment condition] under section 525." *Ibid.*

The D.C. Circuit also rejected the FCC's argument that cancellation of respondents' licenses had not occurred "solely because" of respondents' failure to pay a debt within the meaning of Section 525. Pet. App. 44a-46a. The court did not dispute that the purpose of cancellation was to preserve the integrity of the auction process and select the licensee most likely to use the spectrum efficiently for public benefit. *Id.* at 44a-45a. But it concluded that, although "the Commission had a regulatory motive for examining NextWave's timely payment record and canceling its licenses on that basis," the licenses were canceled "solely because" of respondents' default because the FCC relied on non-payment as the triggering event for cancellation. *Id.* at 45a-46a.

The D.C. Circuit had "no doubt that in developing its installment payment plan, the Commission made a good faith effort to implement Congress's command to encourage small businesses with limited access to capital to participate in PCS auctions." Pet. App. 48a. The appeals court also agreed that "allowing NextWave to retain its licenses may be 'grossly unfair' to losing bidders and licensees who 'complied with the administrative process and forfeited licenses or made timely payments despite their financial difficulties.'" *Ibid.* Ultimately, however, it characterized the Commission as having "enter[ed] a creditor relationship with winning bidders." *Id.* at 50a. The court thus held that "section 525 prevents the Commission, whatever its motive, from canceling the licenses of winning bidders who fail to make timely installment payments while in Chapter 11." *Id.* at 49a.[7]

In the wake of the D.C. Circuit's decision, respondents filed a disclosure statement in the bankruptcy court relating to a second plan of reorganization, to which the government objected. That plan is premised on the assumption that respondents would retain the licenses and pay the FCC the full amount of their original bid. No date has been set for a hearing on the disclosure statement or confirmation of the plan of reorganization. On March 29, 2002, the bankruptcy court extended respondents' exclusive period for soliciting acceptance of a reorganization plan until September 30, 2002. That date will likely be extended in light of the proceedings before this Court.

SUMMARY OF ARGUMENT

I. A. In Section 309(j) of the Communications Act, 47 U.S.C. 309(j), Congress established a market-based system of auctions for allocating licenses to use scarce radio spectrum. That congressional action reflected a determination

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[7] In light of the protracted bankruptcy litigation over the PCS licenses, the FCC has suspended its installment payment program, explaining that the statutory objective "to speed service to the public cannot be achieved when licenses are held in abeyance in bankruptcy court." See *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for PCS Licensees*, 13 FCC Rcd 15,743, ¶ 50 (1998). The Commission remains free, under the statute, to reinstate its installment payments program if conditions warrant. In any event, several hundred licenses with installment payment conditions (in addition to those issued to respondents) remain outstanding.

that an entity's willingness and ability to pay the most for the license demonstrates its ability to use the spectrum most effectively and efficiently in the public interest.

The bidder's willingness and ability to stand behind its winning bid is the linchpin of the license auction process. Only if the bid is an accurate reflection of the bidder's valuation of the spectrum can the auction achieve a fair and efficient allocation of licenses. If the bidder can alter or modify its obligation after the auction's conclusion, the auction method of allocating licenses is fatally undermined. Bids would no longer reflect willingness to pay or true valuation. FCC spectrum licenses are therefore conditioned on full and timely payment of winning bid amounts, and licenses automatically cancel for noncompliance with that condition. That condition also ensures that spectrum can be quickly recovered and re-auctioned, so that it does not lie fallow for extended periods contrary to Congress's express intent.

B. The requirements of full and timely payment are thus fundamentally regulatory. Under the auction approach, failure to make a timely payment indicates that the spectrum was not optimally licensed and therefore triggers cancellation and prompt reallocation. Consequently, the full and timely payment condition lies beyond the authority of bankruptcy courts to modify or alter. As this Court has explained, only the Commission is empowered to allocate radio spectrum in the public interest. "[N]o court can grant an authorization which the Commission has refused." *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 14 (1942). Here, respondents' winning bids and promises to make timely payments were the basis on which they were awarded their licenses over competing applicants. Their failure to make good on those undertakings violated the terms of their licenses and divested them of the right to retain them to the exclusion of others. Bankruptcy courts are not empowered to edit FCC licenses to delete the very condition that was most critical to the FCC's decision that the public interest would best be served by allocating the spectrum to a particular license-holder.

II. Notwithstanding those principles, the D.C. Circuit held that Section 525 of the Bankruptcy Code, 11 U.S.C. 525, allows a licensee to void a spectrum license's timely payment condition by filing for bankruptcy. That ruling ignores the textual limits of Section 525, as well as that provision's purpose and history; it conflicts with the overall structure of the Bankruptcy Code; and it would inappropriately turn Section 525 into an obstacle to the accomplishment of Congress's goals under the Communications Act.

A. Section 525 prohibits a governmental unit from discriminating against those who have sought bankruptcy protection. It thus provides that a governmental unit may not, among other things, revoke a license "solely because" a debtor "has not paid a debt that is dischargeable" in bankruptcy. 11 U.S.C. 525(a). That provision is inapplicable for at least two reasons: the payment conditions of FCC licenses are not "dischargeable," much less "debts" that are dischargeable in bankruptcy, and cancellation did not occur "solely because" of failure to pay such a debt.

1. The FCC has properly conditioned continued enjoyment of spectrum licenses on the regulatory condition of full and timely payment. Because that condition is regulatory, it is not "dischargeable." It cannot be modified by a bankruptcy court, through discharge or otherwise, so long as respondents hold the licenses. Instead, as the Second Circuit properly recognized in this controversy, only the FCC, not the bankruptcy courts, has the authority to modify regulatory conditions of spectrum licenses. So long as the licensee retains its license—and thereby remains subject to the FCC's regulatory jurisdiction—the regulatory conditions of those licenses are not subject to discharge in bankruptcy.

Indeed, the regulatory payment condition of an FCC license is not itself a "debt" within the meaning of Section 525. Under the Bankruptcy Code, a debt is a liability on a claim, and a claim is a right to payment. The license condition may cause the licenses to cancel on non-payment, but does not itself give the FCC the right to compel payment. Section 525, in any event, prohibits discrimination against bankrupts. It does not permit parties to avoid neutral regulatory requirements by entering bankruptcy. Nor does it allow bankrupts to enjoy exclusive governmental privileges on special terms enjoyed by no one else—terms set by bankruptcy courts rather than the responsible regulatory agency. That comports with the principle that the Bankruptcy Code does not expand property or other rights, and with the Code's preservation of agency regulatory authority.

2. It is also dispositive that respondents' licenses did not cancel "solely because" respondents failed to pay a debt. Instead, they canceled because respondents failed to satisfy a fundamental regulatory condition established long before they entered bankruptcy—a condition designed to ensure that they are the applicants that will best use the spectrum in the public interest. In placing the full and timely payment condition in spectrum licenses, the FCC's interest was not solely, or even chiefly, financial. The auction process seeks to allocate spectrum licenses by identifying the applicant most likely to advance the public interest through efficient use of the spectrum. Under the system Congress established in Section 309(j), respondents' failure to fulfill their winning bid obligations belied the regulatory implications of that winning bid, and demonstrated that the public interest would not be served by their exclusive use of the spectrum. The FCC, moreover, specifically examined the circumstances that led to respondents' noncompliance with the license condition and determined that the public interest would not be served by allowing respondents to retain the licenses despite that noncompliance.

3. Section 525's structure, its legislative history, and related provisions of the Bankruptcy Code also demonstrate that Section 525 does not forbid the FCC from enforcing nondiscriminatory regulatory requirements. Section 525 is a "[p]rotection against discriminatory treatment" of debtors,

as its title suggests. Its legislative history clarifies that "consideration of * * * future financial responsibility," S. Rep. No. 989, 95th Cong., 2d Sess. 81 (1978), or examination of "the causes of a bankruptcy" where they "are intimately connected with the license," H.R. Rep. No. 595, 95th Cong., 1st Sess. 165 (1977), is entirely proper. Here, a licensee's refusal or inability to stand behind its winning bid is a crucial indicator that it is not likely to put the licenses to their highest and best use, without delay, in the public interest.

B. The D.C. Circuit's construction of Section 525 is also inconsistent with the structure of the Bankruptcy Code, which generally exempts proceedings by a governmental unit to enforce its "police and regulatory power" from the automatic stay. 11 U.S.C. 362(b)(4). The FCC's license cancellation was plainly an action by a governmental unit to enforce its regulatory power within that statutory exemption—as the Second Circuit expressly held. Section 525 was designed to address efforts to frustrate the bankruptcy laws, such as the state statute addressed in *Perez* v. *Campbell*, 402 U.S. 637 (1971). It should not be read to frustrate companion provisions of the Code by prohibiting precisely the sort of regulatory activity that Section 362(b)(4) is designed to permit. Indeed, by so reading Section 525, the D.C. Circuit invited precisely the sort of bankruptcy court intrusion into regulatory matters against which this Court has repeatedly admonished.

C. Finally, the D.C. Circuit's decision would bring the Bankruptcy Code into needless conflict with the Communications Act. That court's holding that Section 525(a) prohibits the FCC from canceling licenses allocated by auction for failure to fulfill the central regulatory condition of full and timely payment would render the most important consideration in licensee selection—the applicant's willingness to pay more than others—the least enforceable. It would thus undermine the allocation system established by Section 309(j) by awarding licenses to entities that will not use them to the greatest public benefit; and it would cause spectrum to be tied up in protracted bankruptcy litigation rather than being placed into immediate service.

It is a fundamental principle that, where possible, one federal statute should not be interpreted in a manner that obstructs the functioning of another. Contrary to that principle, the decision below inappropriately disregarded textually persuasive constructions of Section 525 that would accommodate that provision to the text and policies of the Communications Act, in favor of a construction that places those provisions in irreconcilable conflict.

ARGUMENT

SECTION 525 OF THE BANKRUPTCY CODE DOES NOT DISPLACE THE FCC'S EXCLUSIVE REGULATORY AUTHORITY OVER SPECTRUM LICENSING AND THE LICENSE ALLOCATION MECHANISM ESTABLISHED IN 47 U.S.C. 309(j)

Through 47 U.S.C. 309(j), Congress directed the FCC to adopt a market-based system of spectrum allocation that awards licenses to the applicant best able to use the spectrum effectively and efficiently in the public interest. Congress did not direct the FCC to "sell" spectrum or licenses. Instead, Congress adopted auctions as "an efficient regulatory regime" that allocates scarce radio spectrum to its "most productive uses," because those entities that will use spectrum most productively will generally also be willing to pay the most for it. Pet. App. 107a, 228a. That mechanism can operate effectively, however, "only if the high bid entails *the obligation to make good* the amount bid." *Id.* at 246a (emphasis added). FCC spectrum licenses are therefore conditioned on compliance with all payment obligations, and breach of that condition has "more than financial implications." *Id.* at 109a, 234a. As the Second Circuit held, such noncompliance belies the information conveyed by the winning bid; it indicates that the applicant, despite its bid, is "not the applicant most likely to use the [l]icenses efficiently" in the public interest. *Ibid.*

The question before the Court is whether the general anti-discrimination provision in Section 525 of the Bankruptcy Code invalidates and displaces the Communications Act's rules for license allocation under Section 309(j). Section 525(a), by its terms, protects bankrupt debtors against "discriminatory treatment" by, among other things, prohibiting govermental units from "deny[ing], revok[ing], suspend[ing], or refus[ing] to renew a license" to "a person that is or has been a debtor under this title * * * solely because such bankrupt or debtor * * * has not paid a debt that is dischargeable in the case under this title." 11 U.S.C. 525(a). While Section 525 bars discrimination, it does not mandate that government except bankrupts from the operation of neutral regulatory conditions designed to ensure that exclusive rights are accorded only when it serves the public interest. Nonetheless, the decision below held that Section 525(a) precludes cancellation of an FCC spectrum license upon failure to make timely payment of regulatory bid amounts on which licenses are expressly conditioned. That decision needlessly places Section 525(a) in irreconcilable conflict with the auction regime Congress established in Section 309(j). Because a winning bidder's willingness and ability to pay more than others is the principal basis for the FCC's decision to select it as the best licensee in the public interest, a licensee's failure to meet that undertaking fatally undermines the regulatory judgment underlying the award of spectrum. Accordingly, spectrum auction rules and FCC licenses make it clear that continued enjoyment of licenses is conditioned on timely and full payments. Yet, under the court of appeals' decision, the FCC cannot enforce that regulatory condition.

Nothing in Section 525(a) compels that result. The full and timely payment condition in FCC licenses does not discriminate against licensees that have been bankrupt or enter bankruptcy. It merely establishes a neutral regulatory requirement. It is a fundamental canon of statutory construction that statutes, where possible, should be construed so as to prevent them from obstructing one another. See *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). Cf. *Nathanson* v. *NLRB*, 344 U.S. 25, 30 (1952) ("wise administration * * * demands that the bankruptcy court accommodate itself to the administrative process"). See also *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (specific statute not to be controlled or nullified by general one). As this Court has explained, federal courts should adopt the "permissible meaning" of an ambiguous statute "which fits most logically and comfortably into the body of both previously and subsequently enacted law," not because that precise "accommodative meaning" was necessarily "what the lawmakers must have had in mind," but because it is the role of the federal courts "to make sense rather than nonsense out of the *corpus juris*." *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 100-101 (1991).

In contravention of those principles, the decision below needlessly renders the law self-contradictory, rejecting a persuasive construction of Section 525 that accommodates that provision to the specific requirements of the Communications Act and the auction regime established in 47 U.S.C. 309(j). Section 525(a) by its terms is inapplicable *unless* the license is refused or reclaimed "*solely because*" of a failure to pay a "*debt that is dischargeable*" under the Bankruptcy Code. The condition in an FCC license requiring a licensee to meet its regulatory bid obligations is not a "debt that is dischargeable" in bankruptcy. To the contrary, the license condition is not even properly construed as a debt; and so long as the licensee holds its license, the terms of the license (including payment requirements) are beyond the authority of bankruptcy courts to modify or discharge. Moreover, where an FCC license cancels for failure to meet a regulatory payment condition, cancellation does not occur "solely because" of the licensee's failure to pay a "debt" within the meaning of Section 525. Rather, cancellation occurs primarily because of the licensee's noncompliance with license conditions, which demonstrates that it is *not* the applicant *that will best use the license in the public interest*

I. The Auction Payment Requirement Of FCC Licenses Is Beyond The Authority Of Bankruptcy Courts To Modify

For more than 60 years, the Communications Act has accorded the FCC exclusive authority to grant telecommunications licenses if the "public interest, convenience, and necessity would be served thereby." 47 U.S.C. 309(a). "[I]t is the Commission, not the courts, which must be satisfied that the public interest will be served" in the grant of a license. *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946). "[N]o court can grant an applicant an authorization which the Commission has refused." *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 14 (1942).

A. The Full And Timely Payment Requirement Is A Fundamental Regulatory Condition

In Section 309(j) of the Communications Act, Congress established a market-based mechanism for ensuring that the grant of spectrum licenses serves the public interest. The statute directs the FCC to employ a system of competitive bidding to award spectrum licenses in a manner that furthers "the development and rapid deployment of new technologies, products and services" to benefit the public, 47 U.S.C. 309(j)(3)(A), and promotes "efficient and intensive use of the electromagnetic spectrum," 47 U.S.C. 309(j)(3)(D). "Because new licenses would be paid for," the legislative history states, "a competitive bidding system will ensure that spectrum is used more productively and efficiently than if handed out for free." H.R. Rep. No. 111, 103d Cong., 1st Sess. 249 (1993). See H.R. Rep. No. 19, 103d Cong., 1st Sess. 16 (1993) (competitive bidding assigns spectrum "based on economic value to the user, as expressed by a willingness to pay"). As the Second Circuit observed, Congress directed the FCC to select licensees by auction in order to "direct licenses toward those entities and technologies that would put them to the best use." Pet. App. 107a, 226a.

Echoing that "classical belief in the efficacy [of] market forces," Pet. App. 229a, the FCC likewise has determined that "auction designs that award licenses to the parties that value them most highly will best achieve" the Communications Act's goals. *In re Implementation of Section 309(j) of the Communications Act*, 9 FCC Rcd 2348, ¶ 70 (1994). The Commission explained:

> Since a bidder's abilities to introduce valuable new services and to deploy them quickly, intensively, and efficiently increase the value of a license to a bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services * * * *and the efficient and intensive use of the spectrum.*

Id. at ¶ 71. Thus, as the Second Circuit observed, the purpose of the auction mechanism is "to create *an efficient regulatory regime* based on the congressional determination that competitive bidding is the most effective way of allocating" scarce radio frequencies "to their most productive uses." Pet. App. 107a (emphasis added).

> The FCC was not asked to sell off the spectrum (something it did not own) in an effort to raise as much money as possible; it was not asked to develop a free-market system to maximize revenue. Instead, it was told to auction licenses to the highest bidder because such a system was thought likely to promote the development of new technologies and encourage efficient use of the spectrum, while simultaneously recouping some of the value of the spectrum for the public.

Id. at 107a, 228a-229a.[8]

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[8] See also 47 U.S.C. 309(j)(7)(B); H.R. Rep. No. 111, *supra*, at 258 (stating that "[t]he Commission is not a collection agency" and emphasizing that "important communications policy objectives should not be sacrificed in the interest of maximizing revenues from auctions").

That market-based mechanism can achieve a "fair and efficient allocation of spectrum licenses," however, "only if the bids constitute a reliable index of the bidders' commitments to exploit and make the most of the license at issue" and thus "only if the high bid entails *the obligation to make good* the amount bid." Pet. App. 246a (emphasis added). As the Commission has explained, "[i]nsincere bidding * * * distorts the price information generated by the auction process and reduces its efficiency." 9 FCC Rcd 2348, ¶ 147. Absent a requirement that licensees comply with their bid obligations, applicants could, with impunity, submit bids that exceed their expected return on the spectrum on the chance that the spectrum might increase in value—thereby obtaining spectrum that other users value more highly than they do and undermining the very purpose of allocating licenses by auction. Those risks are particularly acute when a licensee opts to pay in installments because the extended time period increases the opportunities for speculation. Failure to make timely payments belies the regulatory implication of the original high bid, namely that the applicant will make the most efficient use of the spectrum. Consequently, failure to make full and timely payment has "more than financial implications." Pet. App. 109a, 234a. Instead, it "indicate[s] that under the predictive mechanism created by Congress to guide the FCC," the defaulting bidder is "not the applicant most likely to use the [l]icenses efficiently for the * * * public in whose interest they were granted." *Ibid.*

For that reason, from the outset of competitive bidding—long before any bidder entered bankruptcy—the FCC conditioned the grant of any license allocated at auction upon the "full and timely payment of the winning bid amount," 47 C.F.R. 24.708(a) (1997), and provided that if a licensee pays in installments, its licenses "shall be conditioned upon the full and timely performance of the licensee's payment obligations," 47 C.F.R. 1.2110(e)(4) (1997), and "will automatically cancel" in the event of default, 47 C.F.R. 1.2110(e)(4)(iii) (1997). Each of the licenses at issue in this case made it clear that it was conditioned on "full and timely payment of all monies due" and that failure to comply with that requirement would "result in the automatic cancellation of" the license. Pet. App. 388a (Licenses). See also *id.* at 393a (Installment Payment Plan Note); *id.* at 409a (Security Agreement).

The full and timely payment requirements are critical not only to the integrity of the auction process as a means of identifying the best qualified licensee, but also to ensuring that spectrum is put to prompt and efficient use, as required by Section 309(j). The "[t]imeliness of such payments is a necessary indication * * * that the winning bidder is financially able to meet its obligations on the license and intends to use the license for the provision of services to the public." *In re Southern Communications Sys., Inc.*, 12 FCC Rcd 1532, ¶ 6 (1997); accord *In re Longstreet Communications Int'l, Inc.*, 12 FCC Rcd 1549, ¶ 6 (1997). The Commission's payment deadlines thus "provide an 'early warning' that a winning bidder unable to comply with the payment deadlines may be financially unable to meet its obligation to provide service to the public." *Mountain Solutions, Ltd.* v. *FCC*, 197 F.3d 512, 518 (D.C. Cir. 1999). And providing for prompt cancellation of licenses upon failure to meet bid obligations facilitates expeditious reclamation and prompt re-auction, thereby furthering Congress's goal of "bring[ing] competitive wireless services to the public without undue delay." Pet. App. 66a. See 47 U.S.C. 309(j)(3)(A) (requiring FCC to ensure "rapid deployment of new technologies, products, and services * * * without administrative or judicial delays"). The license conditions of timely and full payment thus are "paramount to preserve the reliability and integrity of" the "auction licensing program," Pet. App. 66a, and indispensable to auction as a mechanism for "the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum," Pet. App. 119a.

B. Bankruptcy Courts May Neither Exercise The Commission's Authority To Select Licensees Nor Excise Regulatory Conditions From Licenses

Recognizing the critical role of the full and timely payment conditions in FCC licenses, the Second Circuit properly concluded that bankruptcy courts lack authority to modify or displace them. See pp. 9, 10-11, *supra*; Pet. App. 108a-109a, 232a-235a. In this case, respondents bid more than $4.7 billion for 63 FCC licenses at auction and received those licenses conditioned on timely payment of that sum, but filed for bankruptcy *before ever making an installment payment.* Respondents did not pursue the regulatory restructuring options offered by the Commission. Nor did they seek bankruptcy court authorization to make the required payments as ordinary business expenses. 11 U.S.C. 363(c), 1108. Instead, respondents asked the bankruptcy court to declare the licensing transaction "constructively fraudulent" and to order the FCC to permit them to retain the licenses—later valued at over $15 billion—for just over $1 billion, or less than one-quarter of respondents' winning bid.

As the Second Circuit properly held, that sort of relief could not be reconciled with the market-based auction mechanism Congress established in 47 U.S.C. 309(j) or, more broadly, with the FCC's exclusive authority over the terms of FCC spectrum licenses. Permitting the results of a spectrum auction to "be adjusted in bankruptcy proceedings so that the high bidder takes the license without paying the amount of the high bid" would devastatingly "impair[]" the "auction as a mechanism for determining" which applicant values the licenses most highly. Pet. App. 246a. Such a result would create clear incentives for speculation by permitting heads-I-win, tails-you-lose opportunities: If the value of the spectrum increased, winning bidders could eventually sell the license at a profit; and if the value decreased, licensees could seek to renegotiate license terms in bankruptcy court. That would deprive the auction process of its intended regulatory significance and turn it into the very sort of speculative venture Congress sought to avoid. See pp. 2-3, *supra*.

Respondents' "willingness and ability to pay more than [their] competitors" was "the basis on which" the FCC "decided to grant" them the licenses in the public interest. Pet. App. 234a. Their failure to make good on that undertaking fatally undermined the regulatory determination that they should be awarded those licenses. *Ibid.* To maintain the integrity of the auction process and to ensure that high bidders are the most effective and efficient users of the spectrum, the FCC decided in advance to impose a timely and full payment condition on licenses. This was done not to discriminate against potential bankruptcy or to maximize receipts, but to ensure the efficacy and integrity of auctions as a mechanism for allocating spectrum licenses in the public interest.

Indeed, following lengthy notice-and-comment proceedings, the Commission concluded that it would be contrary to the public interest to permit C-Block licensees such as respondents to retain their licenses without meeting the full and timely payment conditions under which the licenses were granted. See pp. 7-8, *supra*. Bankruptcy courts have no authority (let alone expertise) to second-guess that regulatory determination. This Court has long recognized that "no court can grant an applicant an authorization which the Commission has refused." *Scripps-Howard Radio*, 316 U.S. at 14. Thus, it is the Commission and not the courts that must determine "whether the public interest, convenience and necessity will be served" by the grant of a license application, 47 U.S.C. 309(a); and it is the Commission, not the courts, that determines the license conditions that should be imposed, *Regents of the Univ. Sys.* v. *Carroll*, 338 U.S. 586, 600 (1950). Whatever might be said of a bankruptcy court's power to alter purely financial arrangements—such as debts that remain once an entity surrenders its licenses —a bankruptcy court has no authority to require the Commission to license an entity that is not qualified, Pet. App.

235a, or to excise otherwise valid regulatory conditions from a spectrum license. See *Federal Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("When the court decided that the license should issue without the conditions [imposed by the agency], it usurped an administrative function."); *D.H. Overmyer Telecasting Co.* v. *Lake Erie Comms., Inc.*, 35 B.R. 400, 404 (Bankr. N.D. Ohio 1983) ("the injunctive powers of the bankruptcy court should not be used to force a licensing agency to prefer one applicant over the other," because an "FCC license * * * is an exercise of the government's plenary power over the public airwaves"). A licensee "takes its license subject to the conditions imposed on its use." *P&R Temmer* v. *FCC*, 743 F.2d 918, 928 (D.C. Cir. 1984). Thus, the Second Circuit properly recognized that, "insofar as timely payment was a condition for license retention, the bankruptcy court had no authority to modify it." Pet. App. 42a. See *id.* at 109a, 233a, 235a-236a.[9]

That is not to say, however, that a bankruptcy court lacks authority to address any aspect of the relationship between the FCC and respondents. As the Second Circuit observed, "[t]o the extent that the financial transactions between the two do not touch upon the FCC's regulatory authority, they are indeed like the obligations between ordinary debtors and creditors." Pet. App. 236a. Thus, once "[l]icenses are returned to the FCC, the bankruptcy court may resolve resulting financial claims that the FCC has against" a former licensee "as it would the claims of any government agency seeking to recover a regulatory penalty or an obligation on a debt." *Id.* at 237a. But, so long as a licensee retains its licenses, it remains subject to the FCC's regulatory juris-

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[9] Nor does the logic of the decision below limit the scope of potential intrusion by bankruptcy courts to FCC licenses. The decision would appear to impair the ability of any government entity, state or federal, to assess and collect regulatory fees. A routine state law requiring that a driver pay a set fee to renew a driver's license or license plates, or lose them as a result, could be subject to revision and renegotiation in bankruptcy.

diction, and the regulatory conditions of its licenses remain beyond bankruptcy court authority to modify.

II. Section 525 of The Bankruptcy Code Does Not Supersede The Market-Based Licensing Mechanism Established *in* 47 U.S.C. 309(j)

Respondents no longer seriously dispute that the full and timely payment conditions on their licenses serve a regulatory purpose that is independent of any financial interest the FCC might have in payment. Instead, respondents now argue (and the court of appeals agreed) that Section 525 of the Bankruptcy Code prevents their licenses from canceling for failure to meet those regulatory conditions. That construction of Section 525, however, is contradicted by its language, purpose, and history. It creates an inappropriate conflict between the Bankruptcy Code and the Communications Act. It converts a provision designed to prevent discrimination against bankrupts into a guarantee of uniquely favorable treatment for them. And it contravenes the structure of the Bankruptcy Code, which declines to displace agency regulatory authority with bankruptcy rules designed to address purely financial relationships.

A. Cancellation Did Not Occur "Solely Because" Of Respondents' Failure To Pay A "Debt That Is Dischargeable" In Bankruptcy

Entitled "Protection against discriminatory treatment," Section 525 of the Bankruptcy Code provides that, except as provided in certain statutes:

> [A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title * * * solely because such bankrupt or debtor is or has been a debtor under this title * * * has been insolvent before the

> commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

11 U.S.C. 525(a). Section 525 was intended to "codif[y] the result of *Perez* v. *Campbell*, 402 U.S. 637 (1971)." S. Rep. No. 989, 95th Cong., 2d Sess. 81 (1978). In that case, this Court held that a State cannot, consistent with the fresh-start policy of federal bankruptcy law, "refuse to renew a driver's license because a tort judgment resulting from an automobile accident had been unpaid as a result of a discharge in bankruptcy." *Ibid.*; accord H.R. Rep. No. 595, 95th Cong., 1st Sess. 165 (1977). *Perez* thus involved a state law that discriminated against persons who had previously sought bankruptcy protection; the law frustrated the purpose of federal law by attempting to deny full effect to a bankruptcy court's discharge of a debt.

1. *Respondents' Timely Payment Obligation Under The Licenses Is Not A Debt That Is Dischargeable In Bankruptcy.* By its terms, Section 525 provides that a governmental agency may not revoke or refuse to issue a license "solely because" a debtor in bankruptcy "has not paid a debt that is dischargeable" under the Bankruptcy Code. Thus, if a particular obligation is not subject to discharge in bankruptcy, Section 525 does not apply. See, *e.g.*, *Johnson* v. *Edinboro State Coll.*, 728 F.2d 163, 165 (3d Cir. 1984); 4 L. King, *Collier on Bankruptcy* ¶ 525.02, at 525-5 (15th ed. 2001) (*Collier*). Because the payment obligations in the FCC licenses are regulatory conditions on respondents' right to hold the spectrum licenses, they are not debts, let alone debts that are dischargeable in bankruptcy. To the contrary, as explained above and as the Second Circuit twice concluded, such license conditions constitute regulatory obligations *beyond the authority of bankruptcy courts* to alter or modify. See pp. 9, 10-11, 26-29, *supra*. See also Pet. App. 109a ("Even where the regulatory conditions imposed on a

license take the form of a financial obligation, the bankruptcy and district courts lack jurisdiction to interfere in the FCC's allocation."). Accord, *id.* at 236a, 238a. Simply put, such obligations are not "debts" that are "dischargeable" in bankruptcy, as bankruptcy courts have no authority to excise from an FCC license any regulatory condition—much less the condition that was most critical in selecting the licensee over other applicants in the first instance.

a. The D.C. Circuit nowhere disputed that bankruptcy courts lack authority to discharge or delete the timely payment condition from FCC spectrum licenses while the licenses continue in force. Instead, the court of appeals suggested that the D.C. Circuit, as another "court of competent jurisdiction" could "modify or *discharge it under section 525.*" Pet. App. 42a (emphasis added). The D.C. Circuit fundamentally misread Section 525. Section 525 is not itself a discharge provision; it nowhere authorizes any court to discharge debts. Instead, Section 525 prohibits discrimination against debtors in bankruptcy by specified means. It leaves the issue of dischargeability *vel non* to other provisions of the Bankruptcy Code.

There is, moreover, no basis for the D.C. Circuit's suggestion that it can "discharge" debts within the meaning of Section 525. The D.C. Circuit has authority to review actions of the FCC in a proper case under the Administrative Procedure Act, see 5 U.S.C. 701-706, the Hobbs Act, 28 U.S.C. 2342, and the Communications Act, 47 U.S.C. 402. But Section 525, by its terms, applies only if the debts are "dischargeable *in the case under this title*," *i.e.*, in the case under the Bankruptcy Code. 11 U.S.C. 525(a) (emphasis added). The matter before the D.C. Circuit was not "a case under" the Bankruptcy Code, and the D.C. Circuit identified no provision of the Bankruptcy Code that would authorize it to grant a discharge. To the contrary, for cases like respondents' under Chapter 11, there is but one discharge provision, Section 1141(d)(1), which provides that confirmation of the plan of reorganization "discharges the debtor from any debt that arose before the date of such confirmation." 11 U.S.C. 1141(d)(1)(A). The D.C. Circuit is not a court empowered to confirm a plan of reorganization under Chapter 11, and thus cannot "discharge" a debt under Chapter 11. To the contrary, "original and exclusive" jurisdiction over "all cases under title 11" is vested in the district courts, 28 U.S.C. 1334(a), which may, pursuant to 28 U.S.C. 157(a), refer such cases to "the bankruptcy judges for the district." See also 28 U.S.C. 157(b)(1) and (2)(L).

b. Any claim that the regulatory payment condition of FCC licenses is a "debt that is dischargeable" while the licensee retains the licenses is also inconsistent with fundamental principles of bankruptcy law. As a general matter, the Bankruptcy Code does not create rights, but merely preserves them; bankruptcy courts thus ordinarily may not permit a debtor to retain a license where, under a fundamental condition of the license itself, the debtor is not entitled to it. Cf. *FAA* v. *Gull Air, Inc.*, 890 F.2d 1255, 1261-1262 (1st Cir. 1989) (court could not, under bankruptcy law, preserve rights granted by the FAA where those rights expired by operation of law); *Moody* v. *Amoco Oil Co.*, 734 F.2d 1200, 1213 (7th Cir.) (bankruptcy law does not create property rights where they would not otherwise exist), cert. denied, 469 U.S. 982 (1984); *In re Braniff Airways, Inc.*, 700 F.2d 935, 941-942 (5th Cir. 1983) (similar); H.R. Rep. No. 595, *supra*, at 367 (the Code's property provisions do not "expand the debtor's rights against others more than they exist at the commencement of the case"). In this case, any right to the licenses was, for regulatory reasons, conditioned on respondents' making timely payments. Thus, so long as respondents retain the licenses, bankruptcy courts are without authority to discharge that condition. *D.H. Overmyer*, 35 B.R. at 403 ("Any attempt by a licensee or permit holder to use bankruptcy proceedings to limit the discretion of the regulatory body would be an attempt to enhance the debtor's property rights, contrary to the purpose of the Code."). The bankruptcy court had no more authority to allow respondents to retain the licenses despite failure to make timely payments than the court could void other regulatory provisions of respondents' licenses, such as the requirement that they actually build out a communications network by the prescribed deadline.

For similar reasons, regulatory conditions like the full and timely payment condition are not properly classified as "debts." The financial nature of a condition—particularly a regulatory condition—does not convert that condition into a debt. To the contrary, the term "debt" has a specialized meaning under the Bankruptcy Code. It means "liability on a claim." 11 U.S.C. 101(12). A claim, in turn, is defined as a "right to payment." 11 U.S.C. 101(5)(A). Whatever rights the FCC might have had to payment under FCC rules or the promissory note or security agreements that respondents executed, the FCC had no right to demand payment *under the spectrum licenses* themselves. The licenses would cancel if the licensee failed to make timely payment. But the FCC could not invoke the license condition to force the license-holder to make payment and thereby retain the license.

The nondischargeability of license conditions is confirmed by analogy to the Bankruptcy Code's treatment of executory contracts. In general, a contract is "executory" if "performance remains due to some extent on both sides." *NLRB* v. *Bildisco*, 465 U.S. 513, 522 n.6 (1984). Under 11 U.S.C. 365(b), a debtor may "assume" and thereby retain the benefits of such a contract *only if* it cures all defaults and provides "adequate assurance of future performance"; otherwise, the contract must be "rejected," which releases the counterparty from performance and leaves it with a claim for breach. See 11 U.S.C. 365(b)(1)(C). It is well established that a debtor cannot simultaneously seek "discharge" of its obligation to make payments under such an agreement while retaining the benefits thereof; instead, the debtor must either assume contractual duties along with contractual benefits, or reject the contract in whole. *Bildisco*, 465 U.S. at 531 ("Should the debtor * * * elect to assume the executory contract, however, it assumes the contract *cum onere*"); *In re National Gypsum Co.*, 208 F.3d 498, 506 (5th Cir. 2000) ("[A]n executory contract may not be assumed in part and rejected in part. * * * Where the debtor assumes an executory contract, * * * the debtor accepts both the obligations and the benefits of the executory contract."). Accord *In re Chicago, Rock Island & Pacific R.R.*, 860 F.2d 267, 272 (7th Cir. 1988); *Adventure Res., Inc.* v. *Holland*, 137 F.3d 786, 798 (4th Cir. 1998). In other words, "a debtor may not assume the favorable aspects of a contract * * * and reject the unfavorable aspects of the same contract." *Lee* v. *Schweiker*, 739 F.2d 870, 876 (3d Cir. 1984). Likewise, respondents' regulatory obligations cannot be eliminated—they are not "dischargeable" in bankruptcy—while respondents keep the licenses.

Respondents concede that, if a debtor retains benefits under an executory agreement, the debtor's obligations do *not* constitute a "debt that is dischargeable" in bankruptcy, and Section 525 does not apply. Br. in Opp. 17-18 & n.8 (where bidder assumes contract, the resulting obligation is post-petition and not "dischargeable" in bankruptcy). Yet they offer *no* reason why the same principle does *not* apply here. Simply put, to the extent respondents retain their licenses and the benefits provided thereby, the payment obligations contained in those licenses are not dischargeable. Cf. *National Gypsum*, 208 F.3d at 507 ("the discharge power of § 1141(d) does not reach out to extinguish" obligations under assumed executory contracts). Indeed, if the spectrum licenses at issue here were mere "contracts" and the FCC's interest merely financial rather than regulatory, the licenses unquestionably would be "executory" within the meaning of Section 365.[10] As a result, under respondents'

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[10] Under FCC licenses, performances are owed by both the licensee and the FCC. While respondents must obey FCC rules and make the required payments, the FCC must protect respondents' exclusive right to the spectrum and refrain from authorizing others to use that spectrum. Courts generally conclude that analogous exclusive licensing arrange-

own theory, the payment obligation would *not* be dischargeable so long as respondents retained the licenses.[11]

There is no reason the congressionally authorized regulatory conditions in FCC licenses should be any more dischargeable in bankruptcy than such contractual obligations. To the contrary, given the critical regulatory role those conditions serve in the license allocation scheme Congress established in 47 U.S.C. 309(j), their non-dischargeability should follow *a fortiori*. Any other understanding would convert Section 525 from a prohibition on discrimination against bankrupts into authorization for uniquely favorable treatment for debtors, allowing them to retain licenses without meeting the regulatory conditions of entitlement. The Code does not allow debtors to retain regulatory licenses while discharging regulatory obligations any more than it allows them to retain the benefits of executory contracts free from their burdens.

c. Ultimately, the claim that the payment condition of respondents' licenses is subject to "discharge" even as re-

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ments, made by private parties for commercial reasons, are "executory." See, *e.g.*, *In re Select-A-Seat Corp.*, 625 F.2d 290, 292 (9th Cir. 1980) (software license executory where licensor was "under a continuing obligation not to sell its software packages to other parties" and the licensee was obligated to make payments); *In re James Cable Partners*, 27 F.3d 534, 537 (11th Cir. 1994) (cable franchise agreement).

[11] For similar reasons, duties under executory contracts—like the regulatory payment conditions at issue here—are not "debts" where the contracts remain in force. To the contrary, no "claim" arises unless and until the debtor "rejects" such a contract, surrendering all rights thereunder. See *National Gypsum*, 208 F.3d at 508; *Consolidated Gas, Elec. Light & Power Co.* v. *United Rys. & Elec. Co.*, 85 F.2d 799, 804 (4th Cir. 1936) (claim under "executory contract does not arise * * * until the contract has been rejected"). Accord *Wainer* v. *A.J. Equities, Ltd.*, 984 F.2d 679, 685 (5th Cir. 1993); *Federal's, Inc.* v. *Edmonton Inv. Co.*, 555 F.2d 577, 581 (6th Cir. 1977). And, "[a]bsent a claim, there can be no liability on a claim and, thus, no debt." *Wainer*, 984 F.2d at 685. See p. 33, *supra*. See also Countryman, *Executory Contracts in Bankruptcy*, 58 Minn. L. Rev. 479, 561-562 (1973) (courts generally conclude that "nonaction," *i.e.*, failure to assume or reject executory contract, "means nondischargeability").

spondents hold the licenses is another manifestation of respondents' persistent efforts to retain licenses on terms and conditions other than those established by Congress and the FCC. Respondents were initially awarded the licenses over other applicants based on their promise to pay $4.7 billion. Before serving a single customer or making an installment payment, respondents filed for bankruptcy, labeled their bid obligations "constructively fraudulent," and urged the bankruptcy court to permit them to retain the licenses for just over $1 billion—less than one-fourth of their original bid, and approximately eight percent of the more-than $15 billion at which the spectrum was valued in a later re-auction. Respondents, moreover, actually obtained a bankruptcy court order permitting them to do so. Pet. App. 254a, 272a. Only after the Second Circuit rebuffed that effort and held that respondents could not retain their licenses without meeting all regulatory license conditions did respondents become willing to make payment in full.

Despite that newfound willingness, respondents continue to argue that the *timely* payment condition of their licenses is not enforceable because the required payments are "dischargeable" under bankruptcy law. But, for the same reason respondents cannot retain their licenses for less than the full bid amount in contravention of 47 U.S.C. 309(j), the FCC's rules, and the terms of their licenses, respondents' payment obligations under their licenses are not "debt[s]" that are "dischargeable" in bankruptcy. Instead, so long as respondents retain the licenses, they remain subject to the regulatory conditions thereof—regulatory conditions that a bankruptcy court may not discharge or excise from the licenses.

2. *The Licenses Did Not Cancel "Solely Because" Of Non-Payment Of A Debt.* The court of appeals' reliance on Section 525(a) was mistaken for another, related reason. Section 525(a) prohibits the revocation (or refusal to issue) a license "solely because" a debtor in bankruptcy proceedings has not paid a debt that is dischargeable under the Bankruptcy Code. If the revocation is based on a regulatory

condition that does not discriminate against bankrupts and has a regulatory purpose distinct from the mere fact that a debt remained unpaid, it is not proscribed. 4 *Collier*, *supra*, ¶ 525.02, at 525-5.

a. Here, respondents' licenses did not cancel "solely because" respondents had failed to pay a "debt." Pet. App. 45a. To the contrary, respondents' licenses canceled because respondents failed to comply with a regulatory condition set well before respondents entered bankruptcy and that did not discriminate against them for entering bankruptcy. The condition required timely and full payment without regard to a licensee's relationship to the bankruptcy courts. A licensee in bankruptcy that has made or makes full and timely payment (and meets all other regulatory requirements) keeps its license, while a licensee that fails to render payment loses its license even if not in bankruptcy.

Moreover, this is not a case where the license condition and the government's insistence thereon is motivated solely or even primarily by fiscal concerns or hostility to the bankruptcy laws. To the contrary, the FCC enforces the full and timely payment condition for regulatory reasons. The purpose of the auctions was to select a single applicant, to the exclusion of all others, to use particular spectrum to serve the public. The bids were sought not for the purpose of improving the government's financial posture, but rather because the bids, although expressed in financial terms, are the means by which the Commission ensures that the prospective licensee will best employ the licenses in the public interest. Pet. App. 235a. Because the bid is the central regulatory mechanism used to identify the "best" licensee from among competing applicants, the bidder's failure to make payment in a timely fashion is fatal to its implicit representation that it is the "best" of the potential licensees. The failure to fulfill the winning bid obligations on time thus has "more than financial implications," *id.* at 234a; it signifies that the bidder's representation that it was willing and able to pay more than the other bidders does not hold true, and thus that the basis on which the FCC decided to issue the license does not hold true either, *ibid.*

Moreover, as the Commission has explained, "[t]imeliness of such payments is a necessary indication * * * that the winning bidder is financially able to meet its obligations on the license and intends to use the license for the provision of services to the public." *Southern Communications*, 12 FCC Rcd 1532, ¶ 6; accord *Longstreet Communications*, 12 FCC Rcd 1549, ¶ 6. Consequently, the Commission's payment deadlines "provide an 'early warning' that a winning bidder unable to comply with the payment deadlines may be financially unable to meet its obligation to provide service to the public." *Mountain Solutions*, 197 F.3d at 518. Finally, the license condition ensures that spectrum can be quickly re-auctioned and is not left fallow for years on end in contravention of 47 U.S.C. 309(j)(3)(A). For those reasons, cancellation did not occur "solely because" of respondents' failure to pay a "debt" that is "dischargeable." It occurred principally because respondents' breach of a fundamental condition of licensure fatally undermined the claim that respondents are the best applicant to hold the licenses—just as it would if respondents failed to meet build-out requirements or violated other material license conditions. The FCC thus has repeatedly declined to waive the timely payment condition, even though that might have been contrary to the FCC's own pecuniary interests. See, *e.g.*, *In re Requests for Extension of the Commission's Initial Non-Delinquency Period*, 13 FCC Rcd 22,071 (1998); *In re Licenses of 21st Century Telesis, Inc.*, 15 FCC Rcd 25,113 (2000).

b. The D.C. Circuit did not dispute that the FCC had a valid, non-financial regulatory motive for allowing respondents' licenses to cancel. See Pet. App. 45a. The D.C. Circuit, however, rejected reliance on the FCC's regulatory purpose because, in its view, motive is irrelevant; Section 525(a) applies, the court stated, whenever failure to make timely payment is the "sole" and "reflexive" trigger for license cancellation. *Ibid.* That reasoning is incorrect. First, the phrase "solely because" is properly read as referring to the agency's purpose or motive. Section 525, it must be recalled, is a prohibition on discrimination. In that context, the phrase "solely because" is most sensibly read as referring to the purpose or reason for the act. See *Webster's Third New International Dictionary* 194 (1976) (defining "because" as "for the reason that"). Second, respondents' licenses did not, in fact, cancel "reflexively." The FCC conducted a lengthy proceeding to investigate the difficulties encountered by C-Block licensees such as respondents, and to determine whether the public interest would be served by excusing them from the payment conditions of their licenses. *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for PCS Licensees*, 12 FCC Rcd 16,436, ¶ 11 (1997). During that proceeding, the FCC temporarily *suspended* payment obligations for C-Block and F-Block licensees—which prevented automatic cancellation—and adopted several options designed to aid such licensees. See 13 FCC Rcd 8345, ¶¶ 11-15 (1998); 14 FCC Rcd 6571 (1999). However, the FCC ultimately declined "to adopt proposals that result in a dramatic forgiveness" of bid obligations, because to do so "would be very unfair to other bidders, and would gravely undermine the credibility and integrity of [the auction] rules." 12 FCC Rcd 16,436, at ¶ 19. The FCC again considered the effect on auction integrity and the public interest when respondents sought reconsideration of the cancellation of their licenses. Pet. App. 79a-83a. And the FCC again concluded that "the public interest in maintaining the integrity of the license process through auctions, the need to ensure that licenses are allocated to those licensees that are best qualified to hold them, and" the need to "further competition" precluded it from relieving respondents of the timely payment license condition. *Id.* at 80a. Manifestly, therefore, license cancellation did not occur "solely because" respondents failed to pay. It occurred because of that failure *plus* the FCC's repeated regulatory determinations that allowing respondents to retain their licenses—despite failure to meet the fundamental condition that enabled them to obtain the licenses over all other applicants in the first instance—would be contrary to the public interest the Commission is statutorily required to pursue.

The court of appeals' reasoning also conflates regulatory license conditions (embodied in the spectrum licenses) and a licensee's financial obligations (embodied in promissory notes, other financial documents, and certain FCC regulations). The licenses establish full and timely payment as a regulatory license condition, and that condition exists only so long as the licensee retains the license. In this case, moreover, respondents are not objecting to an FCC effort to *secure* payment, but rather to the FCC's refusal, on regulatory grounds, to allow respondents to retain the licenses even though respondents have now decided they are willing to pay. The Commission's decision to enforce the timely payment license condition is thus a regulatory decision, not a means of collecting past-due sums. It is the means by which the FCC ensures that each license is awarded to the applicant that will best use the spectrum in the public interest. Consequently, respondents' licenses did not cancel "solely because" respondents failed to pay a debt. The licenses canceled primarily because, under the system of license allocation established by Congress in Section 309(j) and implemented by the FCC, respondents had proved themselves *not* to be the entites best able to use the spectrum in the public interest.

3. *The D.C. Circuit's Contrary Construction Of Section 525 Is Inconsistent With Its History And Purpose.* As Section 525's title—"Protection against discriminatory treatment"—and its origins in this Court's *Perez* decision demonstrate, Section 525 is primarily concerned with "discrimination" against bankrupts that inappropriately interferes with the fresh-start policy of the Bankruptcy Code. See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) (heading of statutory provision permissible aid to construction). Section 525 thus "does not prohibit consideration of

other factors, such as future financial responsibility or ability, and does not prohibit imposition of requirements such as net capital rules, if applied nondiscriminatorily." S. Rep. No. 989, *supra*, at 81. Likewise, "where the causes of a bankruptcy are intimately connected with the license * * * an examination into the circumstances surrounding the bankruptcy will permit governmental units to pursue appropriate regulatory policies and take appropriate action without running afoul of bankruptcy policy." H.R. Rep. No. 595, *supra*, at 165. Thus, where an agency merely enforces a nondiscriminatory financial requirement—one that is applicable whether or not a party has filed for bankruptcy—such as requiring "financial responsibility in a particular licensing process," Section 525(a) "is not applicable." 4 *Collier*, *supra*, ¶ 525.02, at 525-5.

The FCC's timely payment requirement serves just such a purpose. As explained above, the "timeliness" of payment "is a necessary indication * * * that the winning bidder is financially able to * * * and intends to use the license for the provision of services to the public," *Southern Communications*, 12 FCC Rcd 1532, ¶ 6, and the breach "provide[s] an 'early warning' that a winning bidder * * * may be financially unable to meet its obligation to provide service to the public," *Mountain Solutions*, 197 F.3d at 518. The FCC, moreover, looked specifically at the circumstances of the C-Block bidders and respondents and determined that, under the public interest standard, respondents should not be permitted to retain the licenses without meeting all regulatory conditions. See p. 39, *supra*.

To prohibit license cancellation under such circumstances is inconsistent with Section 525's purpose, which is to bar discrimination that might prevent debtors from rehabilitating themselves. Section 525 ensures that an enterprise (or individual) that otherwise satisfies all regulatory requirements for a business or professional license may continue, in competition with or on the same terms as all others, to conduct that business notwithstanding failure to pay a discharged or dischargeable debt. For example, in *Perez* itself, this Court held that a State cannot refuse to issue a driver's license until a debtor satisfies a discharged tort judgment. Section 525, however, does not purport to force an agency to give an exclusive license to a business that fails to meet the key regulatory requirement for maintaining the license, much less guarantee that business exclusive rights under a regulatory scheme where competing applicants will better serve the public interest. *D.H. Overmyer*, 35 B.R. at 404 (bankruptcy law does not permit courts to use their powers "to force a licensing agency" like the FCC "to prefer one applicant over the other"); cf. *Duffy* v. *Dollison*, 734 F.2d 265, 273 (6th Cir. 1984) ("We do not believe that section 525 was intended by Congress to afford debtors in bankruptcy such preferential treatment."). To the contrary, "it was never the intention of" Congress "to interfere with legitimate regulatory objectives." 123 Cong. Rec. 35,673 (1977) (statement of Rep. Butler). Yet that is precisely the effect Section 525(a) would have under the D.C. Circuit's decision. Respondents' winning bid and undertaking to pay on time were the principal bases for awarding it the licenses over other applicants. By holding that respondents may retain the licenses to the exclusion of others despite respondents' failure to meet that critical condition, the D.C. Circuit's decision would convert Section 525 from a bar on discrimination against debtors into a rule requiring discrimination in their favor.[12]

Ultimately, the D.C. Circuit rejected the FCC's construction as "a request for a regulatory purpose exception" that does not appear in the statute. Pet. App. 43a-44a. But far

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[12] In fact, the D.C. Circuit's decision would impede Section 525's fresh-start policy. If yet-unpaid license fees are treated as potentially dischargeable debts, and governments cannot deny licenses for failure to pay such debts, then governments will think twice before permitting such fees to be paid on a periodic basis. Although the requirement of up-front payment will not trouble the well-heeled, it hardly furthers the Code's interest in ensuring a fresh start.

from rejecting an effort to rely on an exception Congress never enacted, the court of appeals ended up ignoring the limits Congress actually adopted. Section 525 prohibits only those license revocations that occur "solely because of" the debtor's failure to pay a "debt that is dischargeable" in bankruptcy. As explained above (pp. 30-40, *supra*), those limits on Section 525's scope ensure that it does not interfere with FCC regulatory requirements in the public interest—because the FCC license conditions do not themselves create "debts" that are "dischargeable" while the licenses remain in force, and cancellation for failure to meet those conditions does not occur "solely because" of a failure to pay such a debt. Consequently, Congress's failure to include an express "regulatory exception" was not an expression of intent to supersede the FCC's regulatory authority or to displace the license allocation mechanism established in 47 U.S.C. 309(j). It represents Congress's understanding that such an exception was, in light of the "solely because" and "dischargeable debt" requirements, unnecessary.

B. The D.C. Circuit's Decision Distorts The Structure Of The Bankruptcy Code

The D.C. Circuit's construction of Section 525 also places that provision at odds with the structure of the Bankruptcy Code as a whole, which evidences Congress's intent to avoid interference with regulatory agency authority.

1. The Bankruptcy Code specifically addresses the relationship between regulatory action and debtor interests in Section 362, which governs the automatic stay. Section 362(b)(4) generally exempts regulatory action from bankruptcy-related interference by providing that the automatic stay of proceedings upon the filing of a bankruptcy petition does not apply to "the commencement or continuation of an action or proceeding by a governmental unit * * * to enforce such governmental unit's * * * police and regulatory power." 11 U.S.C. 362(b)(4). This Court thus has repeatedly recognized that the Bankruptcy

Code should not be construed to prevent the government from pursuing its non-creditor, regulatory interests. See, *e.g.*, *Board of Governors* v. *MCorp Fin., Inc.*, 502 U.S. 32, 40 (1991); *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 507 (1986).

In *MCorp*, for example, the Court rejected the claim that bankruptcy courts "have the authority to examine the legitimacy of" an agency's actions "and to enjoin those actions." 502 U.S. at 40. As the Court explained, reading the Bankruptcy Code to "require bankruptcy courts to scrutinize the validity of every administrative or enforcement action brought against a bankrupt entity" would be "problematic, both because it conflicts with the broad discretion Congress has expressly granted many administrative entities and because it is inconsistent with the limited authority Congress has vested in bankruptcy courts." *Ibid.*

Here, the Second Circuit properly held that license cancellation falls within the regulatory exemption provided by Section 362(b)(4), finding it "[u]ndoubtabl[e]" that "the FCC is a governmental unit that is seeking 'to enforce' its 'regulatory power.'" Pet. App. 125a. The D.C. Circuit correctly considered itself bound by that ruling. *Id.* at 34a-35a. As a result, under Section 362, the FCC was permitted to enforce the regulatory cancellation condition of respondents' licenses. There is simply no reason to construe Section 525(a) as precluding precisely the sort of regulatory action that Section 362(b)(4) authorizes.

The D.C. Circuit's contrary reading of Section 525—under which license conditions constitute "debts" that are "dischargeable" in bankruptcy while the licensee retains the licensees—also invites precisely the sort of bankruptcy court intrusion on agency authority this Court found "problematic" in *MCorp*. Here, for example, the bankruptcy court was of the view that it had authority to "discharge" the payment condition of FCC licenses while ordering that respondents retain the licenses. It therefore engaged in its own *de novo* weighing of the policy interests under the Communications

Act and concluded that permitting respondents to retain the licenses—initially for a fraction of the full bid amount—would serve the "public interest" and the policies embodied in 47 U.S.C. 309(j), *notwithstanding* the FCC's contrary conclusion. See Pet. App. 286a-288a; *id.* at 267a (bankruptcy court "spent three pages of its opinion delineating how its chosen remedy would fulfill the objectives of the Bankruptcy Code and § 309(j)."). See also *id.* at 167a. Other bankruptcy courts have done likewise. See *United States* v. *GWI PCS1,* No. 00-1621 Pet. App. at 95a-96a, cert. denied, 533 U.S. 964 (2000). The public interest determination, however, is for the FCC, not a bankruptcy court, to make. Bankruptcy courts, moreover, are ill-suited to make such determinations.[13] Among other things, they may be institutionally predisposed to favor the interests of rehabilitating the debtor and protecting creditors over the broader public interest the Communications Act is designed to serve. See, *e.g.*, Pet. App. 195a ("What regulatory principle or public interest does the FCC invoke to outweigh the investment in these debtors of over $1 billion in debt and equity?"); see also *id.* at 120a.[14]

2. The D.C. Circuit did not dispute that license cancellation is "regulatory action" exempted from the automatic stay under Section 362(b)(4). Nonetheless, that court suggested

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[13] For example, the bankruptcy court suggested that, if the licenses were re-auctioned, the bidding would only be a fraction of the $4.7 billion respondents belatedly offered to pay. Pet. App. 166a-167a; *id.* at 287a. That prediction turned out to be grossly inaccurate; the bidding exceeded $15 billion. Such an error underscores the risks of permitting bankruptcy courts to replace the license allocation mechanism established by Congress in Section 309(j) with their own *ad hoc* determinations.

[14] It would appear to follow from the D.C. Circuit's decision that Section 525 would prevent a State from collecting fees for a variety of renewable state licenses. It is troubling to imagine the interference with regulatory purposes, not to mention principles of federalism, that would flow from a bankruptcy court's evaluation of the proper fee for such licenses and determination that a neutral state license fee constitutes a fraudulent conveyance.

that cancellation of the licenses might constitute an effort to "enforce" a "lien against property of the estate" in violation of 11 U.S.C. 362(a)(4) and (5). The regulatory exception contained in Section 362(b)(4), the D.C. Circuit held, does not apply to those provisions. See Pet. App. 40a-41a; 11 U.S.C. 362(b)(4) (specifying that regulatory exception applies only to stays under "paragraph (1), (2), (3), or (6) of subsection (a)").

The court of appeals erred in attaching significance to the fact that the FCC, in addition to its traditional regulatory powers, also had liens on respondents' licenses. See Pet. App. 39a-40a; *id.* at 125a n.7. Even if the automatic stay prevents the FCC from requiring payment based on the *liens* on the licenses,[15] the full and timely payment condition of the licenses themselves nonetheless retains its character as a regulatory condition. And because that condition is regulatory, it is excepted from the automatic stay by 11 U.S.C. 362(b), as the Second Circuit expressly held. Pet. App. 125a; p. 44, *supra*.

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[15] It is far from clear that the automatic stay applies at all. The automatic stay applies only to actions directed at "property" of the estate or the debtor. 11 U.S.C. 362(a)(4) and (a)(5). Under the Communications Act, no licensee can assert that it has a "property" interest in spectrum as against the FCC. The Communications Act makes it clear that "no person is to have anything in the nature of a property right as a result of the granting of a license." *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). The statute "provide[s] for the use of [radio] channels, but not the ownership thereof." 47 U.S.C. 301. See also 47 U.S.C. 309(j)(6)(D) (competitive bidding does not convey additional rights to licensees); *F.L. Crowder* v. *FCC*, 399 F.2d 569, 571 (D.C. Cir. 1968) ("[A] broadcast frequency is not a homestead which * * * belongs to the settler for whatever uses he desires. Rather, it belongs to the public, who through the Commission, award[s] its use to a licensee to operate consistent with the public interest."). Whatever rights respondents had by reason of the licenses as against third parties, their rights in the licenses vis-à-vis the FCC were limited by the terms and conditions under which the licenses were granted, including the full and timely payment requirement. Gov't Pet. 28 n.10.

The decision below never explained why the Commission's decision to create a lien interest in the licenses *in addition to* its regulatory powers could somehow deprive the FCC of authority to exercise its regulatory powers. Nor could it. The existence of liens did not and could not diminish the scope of the Commission's regulatory authority. To the contrary, the notes and security agreements by their own terms make clear that they do not substitute for, but instead supplement, the regulatory power embodied in the administrative rules and license conditions. Pet. App. 403a-404a.

C. The D.C. Circuit's Decision Inappropriately Places Section 525 In Conflict With The Communications Act

The D.C. Circuit's decision not only fails to comport with ordinary bankruptcy law principles, but is also irreconcilable with the market-based auction allocation mechanism Congress established in Section 309(j).

1. Under the D.C. Circuit's decision, the effect of a bankrupt licensee's failure to meet a fundamental regulatory condition in a radio spectrum license is not determined under rules established by the FCC in pursuit of the public interest. Instead, that failure becomes a matter of bankruptcy law designed to regulate debtor-creditor relations, divorced from the specific and unique public interest concerns of the Communications Act and the FCC's expertise. Nothing in either the Communications Act or the Bankruptcy Code supports, much less compels, that dramatic displacement of FCC authority in this area. To the contrary, when Congress established auctions as a mechanism for issuing spectrum licenses, it provided that "[n]othing * * * in the use of competitive bidding, shall *diminish the authority* of the [FCC] under other provisions of this chapter to *regulate or reclaim* spectrum licenses." 47 U.S.C. 309(j)(6)(C) (emphases added). And Congress further provided that the FCC's use of auctions under Section 309(j) may not "be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within

the same service that were not issued pursuant to [competitive bidding]." 47 U.S.C. 309(j)(6)(D). See also 47 U.S.C. 301 ("[N]o [FCC spectrum] license shall be construed to create any right, beyond the terms, conditions, and periods of the license."). Congress thus made clear that competitive bidding "alters only the licensing process, and has no effect on the requirements, obligations or privileges of the license holders." H.R. Rep. No. 111, *supra*, at 258.

Yet, under the D.C. Circuit's construction, the use of competitive bidding would eliminate the FCC's right to reclaim licenses for failure to meet fundamental license conditions specifically because the auction mechanism was used, *i.e.*, because the regulatory decision to issue the licenses necessarily had a financial component. In light of Congress's decision to use a market-based system for allocating spectrum, that represents a significant intrusion on the FCC's ability "to reclaim licenses," in derogation of 47 U.S.C. 309(j)(6)(C). Moreover, under the D.C. Circuit's decision, the use of competitive bidding effectively would convey additional rights to defaulting bidders—a right to retain licenses in bankruptcy despite failure to meet license conditions—that, but for the use of competitive bidding and invocation of bankruptcy-court protection, would not exist. That result conflicts not only with the express command of Section 309(j)(6)(D), but with basic principles of bankruptcy law. See pp. 32-33, *supra* (Bankruptcy Code does not enhance a debtor's property rights).

2. The D.C. Circuit dismissed the conflict between its ruling and Section 309(j) on the ground that "nothing in the Act required the Commission to choose" to permit winning bidders to pay in installments. Pet. App. 49a-50a. But Congress specifically directed the FCC to "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments" to promote small business participation. 47 U.S.C. 309(j)(4)(A). See also H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 482 (1993) ("The Commission is required to consider alternative pay-

ment schedules and methods of calculation, including initial lump sums, installment or royalty payments."). The D.C. Circuit's decision would effectively render those congressionally sanctioned means inconsistent with achievement of the statute's ends.

The D.C. Circuit's reasoning, moreover, strikes not merely at installment payments but at the core of the auction regime. Section 525 states that a governmental agency may not "revoke" or "suspend" a license solely for nonpayment of a debt dischargeable in bankruptcy. But it also states that an agency may not "deny" a license solely for nonpayment of such a debt. 11 U.S.C. 525(a). Section 525 thus draws no textual distinction between cancellation for noncompliance with an installment payment plan and denial of a license for failure to satisfy a pre-licensing payment requirement, *i.e.*, failure to come up with the bid price in the first instance. A more destructive threat to the Commission's auction process is difficult to imagine. It would not merely embroil licenses in protracted bankruptcy-related litigation, severely undermining Congress's goal of rapid deployment "without administrative or judicial delays." 47 U.S.C. 309(j)(3)(A). It would also render suspect the regulatory condition that is most central in identifying the applicant that will best use a license in the public interest. Under the auction mechanism, it is the winning bidder's willingness and ability to pay the most for the license that identifies it as the party that will best use the spectrum in the public interest. Yet, under the D.C. Circuit's decision, that condition would be virtually unenforceable.

The court of appeals suggested that the Commission could have "made license grants conditional on periodic checks of financial health, a more extensive credit check, or some other evidence that winning bidders were capable of using their licenses in the public interest." Pet. App. 50a. But the auction process was established to identify the best user of scarce spectrum, not merely one that meets marginal qualifications. If the bidder cannot meet its bid obligation, the market-based conclusion that it is the best user of the spectrum is fatally undermined. It was, moreover, precisely to avoid the need for subjective inquiries into whether the bidder is more or less qualified than others—with attendant uncertainty and delays—that Congress replaced comparative hearings with the auction mechanism. See H.R. Rep. No. 111, *supra*, at 248; H.R. Rep. No. 19, *supra*, at 16 (comparative hearings "costly, time-consuming, and provide little basis from which to choose licensees"); pp. 2-3, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.